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In the

Supreme Court of the United States

October Term, 1995

ANTHONY RHODES, U.S. MARINE CORPS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WAS PETITIONER'S RIGHT TO DUE PROCESS OF LAW VIOLATED WHEN THE LOWER COURT DETERMINED THAT AN UNNECESSARILY SUGGESTIVE "SHOW UP" DID NOT RENDER THE SUBSEQUENT IN-COURT IDENTIFICATION OF PETITIONER INADMISSIBLE?

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IN THE
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ANTHONY RHODES, U.S. MARINE CORPS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Anthony Rhodes, respectfully prays, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces rendered in this proceeding on August 23, 1995.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces, *United States v. Rhodes*, 42 M.J. 287 (1995), is reprinted as Appendix A at Pet. App. 1a.

The December 20, 1993, opinion of the Navy-Marine Corps Court of Military Review[1], *United States v. Rhodes*, slip op. No. 90-2458 (N.M.C.M.R. December 20, 1993) is reprinted as Appendix B at Pet. App. 11a.

JURISDICTION

The decision of the United States Court of Appeals for the Armed Forces was rendered on August 23, 1995. Jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. IV 1992).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

On November 19, 1989, Mrs. Rose Stasek was attacked by a lone assailant in her trailer near Marine Corps Air Station, Beaufort, South Carolina. (R. at 75-80). A man entered her trailer and used Mrs. Stasek's clothing to tie her up. (R. at 75-80). Mrs. Stasek managed to evade her attacker and run to another room in the trailer where her husband was sleeping. (R. at 75-80). The attacker fled the trailer. (R. at 75-80). Mrs.

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[1] The Navy-Marine Corps Court of Military Review has been renamed the Navy-Marine Corps Court of Criminal Appeals. Petitioner's case was decided before the name change, so the court's original name is used in this petition.

Stasek described her assailant to police as a black male, wearing a tan suit. (R. at 80, 655-658). Shortly thereafter, Petitioner was detained by police a half-mile from Mrs. Stasek' trailer home and held for identification. (R. at 81, 110, 683). The police **insisted** that Mrs. Stasek go immediately to view the detained individual, explaining that they could only hold him a short while. (R. at 75-85, 657). Police brought Ms. Stasek to identify the Petitioner on the side of a road minutes later. (R. at 75-85, 657).

When Mrs. Stasek arrived for the one-man roadside showup, Petitioner was displayed to her drenched with water, and covered with straw and mud. (Article 32 Investigation at 27). His lip was bleeding and he appeared intoxicated. (R. at 28). While Petitioner was surrounded by policemen and spotlighted with the patrol car's high beams, Mrs. Stasek was asked if she could identify him as the assailant. (R.at 81). Ms. Stasek then identified Petitioner as the man who attacked her. (R. at 81, 657-658).

Police apprehended Petitioner and placed him in pretrial confinement. (R. at 685-86). The next day he made an incriminating statement in which he admitted entering a trailer home by mistake and tying up a woman inside the trailer home. (R. at 692; PE-43).

On September 12-16, 1992, the Petitioner, a Marine Corps Private First Class, was tried by general court-martial composed of officer and enlisted members. Petitioner was tried and convicted of, *inter alia*, attempted rape, breaking and entering, and communicating a threat to Ms. Stasek, in violation of Articles 80, 129 and 134, Uniform Code of Military Justice [hereinafter U.C.M.J.], 10 U.S.C. § 880, 929, and 934 and was sentenced to confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority

approved the sentence as adjudged.

On appeal, the Navy-Marine Corps Court of Military Review affirmed Petitioner's conviction and sentence. *United States v. Rhodes*, slip op. No. 90-2458 (N.M.C.M.R. December 20, 1993).

The United States Court of Appeals for the Armed Forces, granted Petitioner's petition on two issues, heard oral argument and affirmed Petitioner's conviction and sentence. *United States v. Rhodes*, 42 M.J. 287 (1995).

REASON FOR GRANTING THE WRIT

PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE LOWER COURT DETERMINED THAT AN UNNECESSARILY SUGGESTIVE "SHOWUP" DID NOT RENDER THE SUBSEQUENT IN-COURT IDENTIFICATION OF PETITIONER INADMISSIBLE.

The United States Court of Appeals for the Armed Forces has ruled that the unnecessarily suggestive showup to which Petitioner was subjected did not lead to a substantial likelihood of misidentification at the time of trial. *United States v. Rhodes*, 42 M.J. 287, 290-91 (1995). In doing so, the court failed to find that Petitioner's right to Due Process of Law under the Fifth Amendment of the Constitution was violated.

At trial, the Government sought to have Mrs. Stasek identify Petitioner as the man who attempted to rape her some 10 months earlier in the early morning hours of November 19, 1989. The defense objected on the grounds that Petitioner's roadside identification was

constitutionally impermissible, thereby tainting all subsequent identifications. The military judge, however, denied the defense motion and allowed Mrs. Stasek to identify Petitioner as the man who attacked her on November 19, and who she earlier had identified at the roadside showup a short time after the alleged incident. (R. at 75-81, 655-658).

In *Neil v. Biggers*, 409 U.S. 188 (1972), this Court held that the admissibility of an identification obtained as a result of a suggestive confrontation was to be determined by the likelihood of misidentification, focusing on its reliability and taking into account the totality of the circumstances. The Court of Appeals for the Armed Forces affirmed this principle in *United States v. Quick*, 3 M.J. 70 (C.M.A. 1977), and *United States v. Fors*, 10 M.J. 367 (C.M.A. 1981).

When the issue of an unreliable identification is raised, the burden is on the prosecution to prove by a preponderance of the evidence that the identification was reliable. Mil. R. Evid. 321. If the first identification is tainted, subsequent identifications may also be tainted unless based upon an independent source. *Neil v. Biggers*, 409 U.S. at 198. If the initial identification creates a substantial likelihood of irreparable misidentification, then all subsequent identifications must be suppressed. *Id.* That is precisely the analysis that the lower courts should have followed in Petitioner's case. Because Mrs. Stasek's initial identification of the Petitioner at the roadside showup was unreliable and conducted under highly suggestive circumstances, it should have been suppressed along with her subsequent in-court identification.

In *Stovall v. Denno*, 388 U.S. 293, 302 (1967), this Court held that a confrontation may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that a defendant is denied due process of

law. In *Stovall*, there was a one-on-one confrontation in a hospital room where the victim was thought to have not long to live. This Court recognized that "the practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned." *Id.* This Court laid down the rule that whether a given confrontation denied due process of law depends upon the totality of the circumstances surrounding it. *Id.* In *Stovall*, the identification was held not to deny due process because the possible imminent death of the victim rendered no feasible alternative in determining whether Stovall was or was not her assailant. *Id.* Although *Stovall* approved a one-to-one confrontation under the totality of the circumstances present in that case, an important factual difference exists between *Stovall* and Petitioner's case. The victim in *Stovall* was seriously injured by her assailant and left physically incapable of attending a lineup at the police station. Under this particular set of circumstances, a one-man showup was necessary. *Id.* In Petitioner's case, there was no similar justification for incurring the inherent suggestiveness of a one-to-one confrontation. Mrs. Stasek was not physically injured by her assailant (R. at 70-95). No argument has been articulated why a traditional and non-suggestive lineup could not have been employed.

The lower court erred by failing to find that it was an abuse of discretion for the military judge to admit Mrs. Stasek's roadside showup and in-court identification of the Petitioner. Mrs. Stasek's initial identification of Petitioner was not reliable and therefore, all future identifications were tainted. See *Foster v. California*, 394 U.S. 440 (1969).

The alleged attack occurred in the early morning hours. Mrs. Stasek was sleeping in bed at the time the assailant entered her trailer. Mrs. Stasek estimated that

the assailant was in her trailer for about twenty minutes, and that she was only able to observe him at close range for a fraction of that time in a darkened room. (R. at 94). Although she said he was "very close to me and always in front of my face," she also indicated that she looked at him only with her peripheral vision. (R. at 93). When asked by the prosecutor if she had a chance to look at the assailant, she responded that she "turned [her] face away because he threatened me at that point not to look at him." (R. at 78). Given the hour of the alleged attack, and Mrs. Stasek's ambiguous testimony, it is unclear whether Mrs. Stasek had an opportunity to observe her assailant directly.

Mrs. Stasek's testimony suggests that the room was sufficiently well-illuminated for her to clearly observe the assailant's face. However, the facts indicate otherwise. The only illumination came from an elevated outside yard light approximately 50-100 feet away from the trailer. (R. at 97-98). Mrs. Stasek said it was "just your average yard light." (R. at 91). Therefore, it is highly improbable that there was sufficient illumination for Mrs. Stasek to adequately view her assailant's face. Given the circumstances surrounding the attack, the poor lighting and the stress of the situation, it is unlikely Mrs. Stasek actually had sufficient opportunity to observe the assailant prior to the suggestive roadside identification. This makes Mrs. Stasek's initial identification unreliable.

Shortly after the police transmitted Mrs. Stasek's description of the assailant to officers-on-patrol, they were contacted by a patrolman who had detained an individual matching Mrs. Stasek's general description of the assailant walking along the highway not far from Mrs. Stasek's trailer. (R. at 657). Despite Mrs. Stasek's stress and excited state, the police insisted that Mrs. Stasek go immediately to view the detained individual, telling her that they could only hold him a short while.

(R. at 75-85, 657).

When Mrs. Stasek arrived for the one-man roadside identification, Petitioner was displayed to her, drenched with water, and covered with straw and mud. (Article 32 Investigation at 27). His lip was bleeding and he appeared intoxicated. (R. at 28). Moreover, Petitioner, the only African-American present at the showup, was surrounded by police officers as he was displayed for Mrs. Stasek's identification, spotlighted by the high beams of the squad cars. (R. at 28). The manner of the exhibition thus carried with it an implied suggestion by the police that they believed Petitioner was the guilty party. There is no claim that Mrs. Stasek would have been unable to attend a lineup that night. In short, there was no justification for allowing the inherent suggestiveness of a one-to-one confrontation under the circumstances described, nor was there any reason given as to why a traditional and non-suggestive lineup could not have been employed. These facts suggest that the unnecessarily suggestive identifications prohibited by *Neil v. Biggers*, *Foster v. California*, and *Stovall v. Denno*, occurred in Petitioner's case.

Under the circumstances, the roadside showup was conducted under extremely suggestive conditions: Petitioner was detained near the Stasek's trailer shortly after the alleged attack; he looked suspicious because of his disheveled appearance; he was the only African-American present; he was surrounded by police officers and spotlighted with the high beams of the squad cars for identification. All told, it is understandable why Mrs. Stasek simply assumed that Petitioner had to be the same individual that tried to assault her only a short time prior. As more time lapsed, Mrs. Stasek descriptions of the assailant became more detailed. At the time of the initial roadside identification, it appears that Mrs. Stasek based her identification solely on the fact that Petitioner

was a tall black man dressed similar to the assailant. (R. at 75-88). By the beginning of the trial, Mrs. Stasek was able to articulate a detailed basis for her identification of Petitioner as the assailant. (R. at 75-85, 657-658). Therefore, the initial identification and roadside showup tainted all subsequent identifications. *Neil v. Biggers*, 409 U.S. at 198; Mil. R. Evid. 321.

CONCLUSION

Neil v. Biggers and *Stovall v. Denno* require that identifications be reliable even though the confrontation procedure may have been suggestive. In this case, Petitioner's roadside showup was unnecessarily suggestive and Mrs. Stasek's prior identification of the assailant was unreliable. Given the fact that the alleged attack occurred in the early morning hours in a dimly lit trailer, it is doubtful that Mrs. Stasek had sufficient opportunity to observe the assailant prior to the suggestive roadside identification, especially in light of her testimony that she was not able to directly observe the assailant. Because these facts indicate that Mrs. Stasek did not have sufficient opportunity to make a reliable identification in the trailer, the lower courts erred by allowing evidence based on the unduly suggestive one-man showup. (R. at 75-85). Under the totality of the circumstances present here, the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that admission of the roadside identification into evidence denied Petitioner of his right to due process. Therefore, this Court should issue a writ of certiorari and address whether Petitioner's right to due process was violated.

Respectfully Submitted,

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November 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 94-0679

NMCM 90 2458

UNITED STATES, *Appellee,*

v.

ANTHONY RHODES, *Appellant.*

Argued March 8, 1995

Decided Aug. 23, 1995

For Appellant: *Lieutenant D. Jacques Smith*, JAGC, USNR (argued); *Lieutenant A. B. Lustre*, JAGC, USNR.

For Appellee: *Major Laura L. Scudder*, USMC (argued); *Colonel J. Composto*, USMC, *Commander S.A. Stallings*, JAGC, USN (on brief); *Colonel T. G. Hess*, USMC.

Opinion of the Court

CRAWFORD, Judge:

1. Appellant was convicted, contrary to his pleas, of attempted rape (2 specifications), rape, robbery , sodomy

by force, burglary (3 specifications), communicating a threat (4 specifications), assault and battery, and attempted robbery, in violation of Articles 80, 120, 122, 125, 129, and 134, Uniform Code of Military Justice, 10 USC §§ 880, 920, 922, 925, 929, and 934, respectively. The convening authority approved the sentence[1] of a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. He suspended the forfeiture of allowances for 60 months from the date of his action. The Court of Military Review[2] affirmed the findings and sentence on December 20, 1993. We granted review on the following issue:[3]

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ANY IN-COURT IDENTIFICATION OF APPELLANT AS THE ASSAILANT BY MRS. S BECAUSE IT WAS BASED ON AN ILLEGAL IDENTIFICATION NEAR THE TIME OF THE ATTACK.

FACTS

2. At approximately 3:30 a.m., November 19, 1989, Mrs. S was sleeping in her mobile home in a rural area of Beaufort County, South Carolina. After her husband, a snorer, left to sleep in another room, she was awakened when a man opened the back door and came into her bedroom. He told her to be quiet or he would kill her.

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[1] General Court-Martial Order No. 9-91 dated 9 April 1991, should reflect that the sentence was adjudged on 16 September 1990.

[2] *See* 41 M.J. 213, 229 n.* (1994).

[3] *See* 41 M.J. 340 n.1 (1995), for disposition of the second granted issue (41 M.J. 119).

Then he obtained material to gag her and proceeded with his assault upon her. The whole episode took about 20 minutes. There was no light in the room, but there was a light outside 50-100 feet from the trailer that was so bright that the S's had previously asked that it be removed. Mrs. S had a "good look" at appellant. The suspect was a tall black man, 5 feet 10 inches to 6 feet tall, wearing a tan suit, having a short haircut, and being kind of hunched over. When he questioned her, he would take the gag out of her mouth and have her respond in a low voice. She noticed he had an unusual "eyebrow expression." On one occasion pursuant to his request "he kissed me on the lips." It was at this time she noticed that he had full lips and beer on his breath.

3. After the assault, she woke her husband and they drove to a neighbor's trailer to call the police. She told the police that she had been assaulted and described her assailant as 5 feet 10 to 6 feet with full lips and a short, Marine-like, haircut, who was hunched over and had unusual eyebrows with beer on his breath. A few minutes later the police arrived at the trailer court, and she gave the officer a similar description of the assailant. The officer told her, "I have a call." Then he stated: "Would you like to come with me? They apprehended someone on the side of the road." The police had stopped a suspect, a tall black man with a tan suit, walking a nearby road surrounded by marshes. Mrs. S agreed, and she and her husband accompanied the police car to the scene of the stop. While in the car at the scene with the highlights shining on the suspect, she told her husband, "[T]hat's him." She was afraid and did not "want to get out of the car," but she said, "He's got the same tan suit on. He's standing kinda like in a hunched over way" with similar "eyebrow expression, with his eyebrows raised and his eyebrows kinda opened up." She was "certain" of her identification

of appellant as the perpetrator, because she was very attentive at the time of the crime.

4. She testified that at the Article 32, UCMJ, 10 USC § 832, investigation, she had identified appellant as the individual who "resembled the man." While she may not have positively identified appellant at the Article 32 investigation, she testified at trial that is what she had meant to do.

5. The arresting officer, Mitchell W. Lucas, testified that appellant had the smell of alcohol on his breath and was a little unsteady when he was stopped. While the judge found the showup[4] "suggestive," he also found that it would not lead to "an unreliable identification" at trial, citing the following factors in support:

> (a) Mrs. [S] had ample time and ability to view her assailant in the bedroom of her mobile home in the early morning of 19 November 1989. Mrs. [S] saw the black male intruder's face at close range for a total period of about 10 minutes under illumination through the bedroom windows from the nearby yard light.

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[4] A "showup" describes a confrontation in which a single suspect is presented to the witness who is asked whether this is the person who committed the crime. *See Neil v. Biggers*, 409 U.S. 188, 195 (1972); Black's Law Dictionary 1380 (6th ed. 1990); E. Loftus & J. Doyle, *Eyewitness Testimony: Civil and Criminal* 157 (2d ed. 1987); *but see United States v. Wade*, 388 U.s. 218, 229 (1967) ("The pretrial confrontation for purposes of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case, or presentation of the suspect alone to the witness, as in *Stovall v. Denno*," 388 U.s. 293, 301 (1967)).

(b) Despite the assailant's direction to her not too look at him, Mrs. [S]'s attention was focused on the assailant as a result of his threat to rape her, his kissing her, his holding his hand over her mouth and nose, his binding and gagging her, and his conversing with her.

(c) Although somewhat general, Mrs. [S]'s description of her assailant matched that of the accused. She reported to the Sheriff's Department officers that the assailant was a black male, approximately six feet tall, having short hair, and wearing a tan suit. When apprehended approximately a mile away, 20-30 minutes after the reported unlawful entry into the [S] mobile home, the accused was wearing the same style tan suit and his description matched that Mrs. [S] had given police officers.

(d) Mrs. [S] was certain when she identified the accused as her assailant when she saw him at the show-up. She recognized the accused's clothing as being the same style and color suit which the assailant was wearing, as well as his facial expressions, facial features, conformation of the lips, short hair, and particular slouching stance as being the same as her assailant. Likewise, based upon her perceptions of the assailant on 19 November 1989, she was positive of her identification of the accused as her assailant when she saw him at the Article 39(a) [, UCMJ, 10 USC § 839(a)] session for the litigation of these suppression motions on 29 May 1990.

(3) The interval between the commission of the offense and the identification of the accused at the

show-up by Mrs. [S] was no more than 20-30 minutes.

(2d document at front of Vol. IV of Record)

6. Citing the record of trial, the defense argues that the rape occurred in the early morning and the victim did not look directly at appellant. The room was not lit, and an outside yard light was 50 to 100 feet away. Thus, the defense concludes that Mrs. S did not have a good opportunity to view appellant. The defense further argues that the roadside identification could not have been more suggestive as appellant was drenched with water, straw, and mud. Art. 32 investigation at 27. His lip was bleeding, and he appeared intoxicated. *Id.* at 28. It was because of this disheveled appearance and the shining headlights on him that he was identified by the victim. The defense asserts that this initial roadside identification tainted all subsequent identifications. Final Brief at 6-8.

DISCUSSION

7. While "four possible attacks on eyewitness identification evidence" exist, appellant alleges only a violation of the Due Process Clause of the Fifth Amendment. The standard of review requires this Court to determine if there was an abuse of discretion by the military judge in allowing an in-court identification. *United States v. Webb*, 38 M.J. 62, 67 (C.M.A. 1993).

8. Mil.R.Evid. 321(a)(1) and (d)(2),[5] Manual for

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[5] The pertinent part of Mil.R.Evid. 321 provides:

Rule 321. Eyewitness identification.

(a) *General rule.*

(1) *Admissibility.* Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules . . .

(2) *Exclusionary rule.* An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if:

* * *

(B) Exclusion of the evidence is required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces. Evidence other than an identification of the accused that is obtained as a result of the unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the armed forces.

(b) *Definition of "unlawful".*"

(1) *Lineups and other identification processes.* A lineup or other identification process is "unlawful if the identification is unreliable. An identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification.

* * *

(d) *Burden of proof.* When a specific motion or objection has been required under subdivision (c((3),

Courts-Martial, United States, 1984, adopt a two-prong test based upon Supreme Court case law for determining admissibility of eyewitness identification. *See, e.g., Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.s. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967); *United States v. Webb, supra; United States v. Fors*, 10 M.J. 367 (C.M.A. 1981). First, was a pretrial identification unnecessarily suggestive? *Stovall v. Denno, supra* (hospital showup held imperative, and thus permissible, because victim was in critical condition). Second, if the pretrial identification was "unnecessarily suggestive" was it conductive to a substantial likelihood of misidentification? *Manson v. Brathwaite, supra. See also United States v. Fors*, 10 M.J. 372 (suggestive identification because accused only person in both lineups). An "unnecessarily suggestive" pretrial identification does not preclude a reliable in-court identification. *Id.*

9. Generally, a showup by its very nature is suggestive. However, it is not enough merely to establish that showup

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> the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence. When an appropriate objection under this rule has been made by the defense, the issue shall be determined by the military judge as follows:
>
> * * *
>
> (2) *Unreliable identification.* When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances; provided, however, that if the military judge finds the evidence of identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

is suggestive. Due process is not violated unless there is an "unnecessarily suggestive" pretrial identification that leads to a substantial likelihood of mistaken identify at the time of trial. An immediate identification while the witness' memory is still fresh and when there are no grounds for holding a suspect has been held not to be unnecessary under the Due Process Clause of the Fifth Amendment. *Johnson v. Dugger*, 817 F.2d 726, 729 (11th Cir. 1987); *State v. Perkins*, 141 Ariz. 278, 686 P.2d 1248, 1259 (1984). It is important to have a one-on-one confrontation take place immediately after a crime while memories are fresh so innocent individuals may be released. *Id.* An immediate confrontation permits investigative activities to be refocused if there is no identification. *States v. Collette*, 199 Conn. 308, 310-11, 507 A.2d 99, 101 (1986).

10. Assuming arguendo that there was an "unnecessarily suggestive" showup on the road, we will examine the second prong to determine whether there was a reliable identification at trial. The following factors support a reliable identification: "opportunity to view" the actual perpetrator of the offense, *Manson v. Brathwaite*, 432 U.S. at 114; *Neil v. Biggers*, 409 U.S. at 199; "the witness' degree of attention," 409 U.S. at 199; a short "length of time between the crime and the confrontation," 409 U.S. at 199-200; *see* 432 U.S. at 115; no discrepancy between offender's description and appellant, 432 U.S. at 115; and little likelihood of other individuals in the area at the time of the offense matching the description given by the victim.

11. Mrs. S had about 20 minutes to look at the perpetrator. While she did not constantly observe him face-to-face, they were face-to-face when he questioned her. She replied to his questions when he took the gag out

of her mouth. This viewing took place in the light from an outside light 50 to 100 feet away. Mrs. S's eyes had adjusted for a nighttime viewing. Thus, it was not a totally darkened room. Her description of the offender--a tall black man with a tan suit and dress shoes--fit exactly the individual who was apprehended a short time later. As to the degree of attention, she testified that she was very attentive at the time of the crime. There were no discrepancies between her description and the physical appearance of appellant. Lastly, the identification was made shortly after the crime on a rural road at approximately 4:00 a.m. At that time it is highly unlikely that someone would be walking down the road in a suit and dress shoes.

12. Thus, we conclude that the reliability of the in-court identification outweighs the suggestiveness of the showup. *Cf. United States v. Evans*, 484 F.2d 1178, 1186-87 (2d Cir. 1973).

13. While a lineup with the appropriate number of fillers certainly would have been fairer than a showup, this does not preclude an in-court identification in this case. Based upon the totality of the circumstances, we hold that the judge did not abuse his discretion by allowing Ms. S to identify appellant in court.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX B

DEPARTMENT OF THE NAVY
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IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

R.A. JONES ALBERT A. REED T.A. LAWRENCE

UNITED STATES

v.

ANTHONY RHODES, 059 58 3830
Private First Class (E-2), U.S. Marine corps

NMCM 90 02458 Decided 20 December 1993

Sentence adjudged 23 June 1990. Military Judge: R.G. Walls. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, FMF Atlantic, Marine Corps Air Station, Cherry Point, NC 28533-8033.

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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REED, Senior Judge:

We have examined the record of trial, the assignments of error,[1] and the Government's reply thereto and have

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[1] I. THE MILITARY JUDGE ERRED IN DENYING THE APPELLANT'S MOTION TO SEVER THE OFFENSES COMMITTED AGAINST LCPL C FROM THE OFFENSES AGAINST MRS. S AND LCPL B.

II. THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THE IDENTITY OF THE ASSAILANT THAT ATTACKED LCPL B OR LCPL C.

III. TRIAL DEFENSE COUNSEL WAS INEFFECTIVE: (1) BY NOT INFORMING THE MEMBERS THAT LCPL B WAS NOT THE ONLY FEMALE MARINE WHO HAD REPORTED AN INTRUDER IN THE BARRACKS SHORTLY BEFORE THE ATTACK ON LCPL C, ALLOWING THE GOVERNMENT TO MISLEAD THE MEMBERS AND (2) HE DID NOT CONTACT ANY OTHER FORENSIC ODONTOLOGIST BECAUSE THE ONE FORENSIC ODONTOLOGIST FROM WHOM HE OBTAINED AN OPINION CONCURRED WITH THE GOVERNMENT'S EXPERT THAT APPELLANT MADE THE BITE MARKS ON THE ROLL OF TAPE.

IV. THE MILITARY JUDGE INCORRECTLY HELD THE DEFENSE RESPONSIBLE FOR A DELAY, CAUSED BY THE GOVERNMENT'S NEGLIGENT HANDLING OF A DEFENSE REQUEST FOR DNA TESTING.

V. THE MILITARY JUDGE ERRED BY INCORPORATING INTO HIS INSTRUCTION A CRITICAL PIECE OF EVIDENCE FAVORABLE TO THE GOVERNMENT, THEREBY SEEMING TO ENDORSE THE GOVERNMENT'S ARGUMENT THAT IT IDENTIFIED APPELLANT AS THE

ASSAILANT.

VI. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ANY IN-COURT IDENTIFICATION OF APPELLANT AS THE ASSAILANT BY MRS. S BECAUSE IT WAS BASED ON AN ILLEGAL IDENTIFICATION NEAR THE TIME OF THE ATTACK.

VII. APPELLANT'S PRETRIAL STATEMENT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE BECAUSE THERE HAS BEEN NO KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO REMAIN SILENT OR TO CONSULT WITH ANY ATTORNEY.

VIII. THE PANEL, COMPOSED ENTIRELY OF CAUCASIAN MALES, WAS INSPIRED BY RACIAL PREJUDICES TO AWARD APPELLANT A SENTENCE, WHICH EVEN TAKING INTO ACCOUNT THE SERIOUSNESS OF HIS OFFENSES, WAS INAPPROPRIATELY SEVERE.

IX. THE MEMBERS MAY HAVE AWARDED APPELLANT AN INAPPROPRIATELY SEVERE SENTENCE BECAUSE THEY WERE OFFENDED BY INAPPROPRIATE COMMENTS ABOUT TWO OF THE VICTIMS BY HIS WIFE AND MOTHER.

X. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE.

XI. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

XII. THIS COURT DOES NOT HAVE POWER TO REVIEW THIS CASE BECAUSE ITS JUDGES ARE NOT APPOINTED TO A FIXED TERM OF OFFICE.

concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

FACTS

In October 1989, two women Marines were attacked in their barracks rooms by a lone assailant. Both resided on board the Marine Corps Air Station, Beaufort, South Carolina. The victims, Lance Corporals B (assaulted on 2 October 1989) and C (assaulted on 22 October 1989), could not identify the assailant in either case. Each, however, provided investigators with sworn written statements describing her assailant's height and weight, speech pattern and accents, and body marks (mole on back shoulder area). Each also described statements which the assailant made during the attacks.

The assailant who attacked LCpl B tore off pieces of tape with his teeth, and made her place the tape over her eyes and mouth before he raped her. Investigators found a roll of tape in LCpl B's room bearing teeth marks. Semen and blood testing were run on LCpl B's clothing and bed sheets, and the roll of tape bearing the teeth marks was sent out for examination by a bite mark expert.

LCpl C was able to drive off her assailant before he was able to rape her. At one point during his attack on LCpl C, her assailant, said, "You'll tell on me like the other bitch," when she suggested that he could simply leave without any risk of future disciplinary action, because she

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XIII. THIS COURT HAS NO POWER TO REVIEW THIS CASE BECAUSE ITS JUDGES ARE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

could not identify him.

On the night of 19 November 1989, Mrs. S was assaulted by a person who entered her trailer home located near the Beaufort Air Station and attempted to rape her. Appellant was detained by police a few miles from Mrs. S's trailer home where Mrs. S positively identified him as her assailant. Police apprehended appellant and place him in pretrial confinement. The next day he made an incriminating statement in which he admitted entering a trailer home by mistake and tying up a woman inside the trailer home. Various aspects of Mrs. S's assault tied appellant to the two pervious assaults on C and B. Appellant was subsequently tried on charges alleging various aspects of criminal sexual assaults on these three women.

LAW

In his first assignment of error, appellant argues that the military judge erred in not severing the offenses committed against Lance Corporal C from the offenses against Mrs. S and LCpl B. We disagree. As appellant notices in his pleadings, military practice favors the joinder of all known charges. A military judge should sever charges only if joinder will result in manifest injustice to the accused. *See* Rules for Courts-Martial (R.C.M.) 307(c)(4), 601(e)(2), and 906(b)(10).

In *United States v. Silvis*, 31 M.J. 707 (N.M.C.M.R. 1990) *aff'd*, 33 M.J. 135 (C.M.A. 1991), this Court provided an analytical framework to help in determining whether joinder of offenses would result in a manifest injustice to an accused. There we said the factors to consider included (1) whether impermissible crossover would cause the presence of evidence on charges which

was strong to result in conviction on charges for which evidence was relatively weak; (2) whether evidence of other uncharged offenses would have been admissible; and (3) whether the members were given proper limiting instructions. *Silvis* at 709.

Applying those criteria to the case before us we note the following. The military judge gave several limiting instructions[2] requiring the members to compartmentalize the evidence to individual offenses and limiting the extent that evidence from one offense could be utilized in proving another. The Court of Military Appeals has endorsed such a procedure. *See United States v. Hogan*, 20 M.J. 71 (C.M.A. 1985).

Of course, as the Court of Military Appeals has also recognized, the possibility of a spillover may not be a problem if the evidence presenting the spillover danger is independently admissible under Mil.R.Evid. 401, 402, or 404(b). *See United States v. Curry*, 31 M.J. 359 (C.M.A. 1990). *Curry* holds that the "manifest injustice" test cannot be met when the other-crime evidence would have been admissible. The Government notes in its brief, and we agree that,

> if the charges involving the C assault had been referred to trial without the other offenses, the Government would have been justified in introducing the testimony of B together with the bite-mark evidence as well as S's testimony to prove that the appellant is the perpetrator of the assault on C. Mil.r.Evid. 404(b) permits the

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[2] The military judge instructed the members both before and after the presentation of the evidence of the necessity of compartmentalizing the evidence on the various charges before them. Record at 414 and 839.

> introduction of uncharged misconduct "to show the identity of the accused by demonstrating a common plan or design or *modus operandi* for committing such crimes." *United States v. Jones*, 32 M.J. 155, 157, (C.M.A. 1991). As long as it is logical and relevant it is admissible as direct evidence on the issue of guilt or innocence whether or not the defendant takes the stand.

In the present case the similarities between how the offenses were committed are quite striking. Mrs. S's identification of appellant and appellant's modus operandi in assaulting her led directly to him being connected with the assault son B and C. (*See* Appendix 1 to this opinion, a document provided by appellate defense counsel to this Court during oral argument to note dissimilarities, however, upon reflection, it seems rather to reinforce the similarities common to all three cases in our minds.)

We also note that the victims were all asleep in their beds when appellant struck. The time of night was about the same. The assault in each case was accompanied by an explicit threat that the assailant would kill if the victim did not remain silent. In the assault of B appellant claimed to have a knife; in the assaults on C and S the explicit threat was to "slit your throat." (Record 611 and 645). The assailant in the case of B wore gloves and a ski mask; C's assailant had on black leather gloves and a skull cap. The assailant in all cases had a Marine regulation-type haircut. However, perhaps the most significant and striking signature uniting all three assaults was the affected diction and certain key phrases used during the perpetrations that the victims recalled.

The military judge's precise and timely instructions limiting the possibility of any improper crossover of

evidence, as well as the fact that a substantial part of the evidence of each of the crimes would be probative and admissible on the other offenses, convinces us that all the offenses were properly joined. Appellant's first assignment of error thus lacks merit.

Additionally, we are convinced of appellant's guilt to all offenses of which he was convicted beyond any reasonable doubt. Thus appellant's second assignment of error is also without merit.

In appellant's third assignment of error, he alleges ineffective assistance of counsel because trial defense counsel (1) did not inform the members that LCpl B was not the only female Marine who had reported an intruder in the barracks shortly before the attack on LCpl C, allowing the Government to mislead the members, and (2) did not contact any other forensic odontologist because the one he did obtain concurred with the Government's expert that appellant made the bite marks on the roll of tape.

We do not find fault with trial defense counsel's tactics or decision. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the process that the trial cannot be relied upon to produce a just result." *Strickland v. Washington*, 466 U.s. 668, 686 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Thus a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. An appellant's claim that counsel's assistance was so defective as to require reversal of a conviction has two prongs. "First, the defendant must show that counsel's performance was deficient. This requires showing that

counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. . . Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

"A strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective assistance if counsel first adequately investigate the rejected alternatives." *Palmer v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(citation omitted). "[I]n order for tactical decisions to amount to ineffective assistance of counsel they must be so ill-chosen as to render the trial fundamentally unfair." *Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir. 1984). Appellant's claim that his defense counsel was ineffective when he made the decision not to alert the members to the uncharged assault lacks merit. Counsel knew that alerting the members would risk revealing other possible misconduct not charged that the members might well attribute to appellant. We cannot say that such a tactical choice was not the result of reasonable professional judgment.

Nor do we believe trial defense counsel's decision not to attempt to locate an additional bite-mark expert who might render an opinion contrary to that of the Government's expert (and the expert that defense had already contacted) rendered defense counsel ineffective. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 689. We consider counsel's assistance

reasonable considering all the circumstances of this case. The Government's witness was considered *the expert* in the field. Defense obtained its own expert, a student of the Government's expert, to assist at trial. Defense had a sound reason for using a student of the Government expert to assist the defense,[3] i.e., use of the student to attack the teacher, the student being intimately familiar with the teacher's procedures and manner of investigation. Having had the advice of two experts, one of whom was their own, trial defense counsel cannot be considered ineffective simply because they did not obtain yet another opinion. Counsel has only a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and a "particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances applying a heavy measure of deference to counsel's judgement." *Strickland* at 691. We do not consider the actions of trial defense counsel to be unreasonable under the circumstances. Appellant's third assignment of error is thus without merit.

In his fourth assignment of error appellant alleges the military judge incorrectly held the defense responsible for a delay caused by the Government's negligent handling of a defense request for DNA testing. Having viewed the extensive findings of fact prepared by the trial judge,

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[3] We note that trial defense counsel's expert agreed generally with the Government expert although he would not have certified that the bite marks were appellant's to the same certitude as did the Government's expert. Subsequent expert opinion obtained by appellate defense counsel does not indicate that bite marks are not appellant's but rather question whether appellant is the only one who could have made the marks. Yet another appellate expert opines that the Government expert had insufficient evidence to make a positive identification. We note that even absent the bite mark evidence, we are convinced of appellate's guilt beyond any reasonable doubt.

which we adopt as our own, we find that the Government has acted reasonably under the circumstances. We are convinced that the delay in obtaining DNA evidence was properly attributable to the defense. *See United States v. Longhofer*, 29 M.J. 22 (c.M.A. 1989).

The remaining assignments of error are without merit, and will not be discussed further.

We specifically find the sentence to be appropriate for the offenses of which appellant stands convicted. Accordingly, the findings and sentence, as approved on review below, are affirmed.

R.A. JONES, Senior Judge; ALBERT A. REED, Senior Judge; T.A. LAWRENCE, Judge

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